No. 87-787

In the Supreme Court of the United States

October Term, 1987

UNIVERSITY OF PITTSBURGH
Petitioner,

v.

MATTHEW E. JACKSON, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Pro se

QUESTION PRESENTED

Whether a plaintiff, in an employment discrimination action, at the summary judgment stage, must prove only by direct evidence that there are genuine issues of material that the employer's profferred reasons for the adverse employment decision are a pretext to discrimination?

LIST OF PARTIES

Respondent disagrees with Petitioner's attempt to quietly remove David C. Sullivan and Wesley W. Posvar as parties to this action.

1. UNIVERSITY OF PITTSBURGH
2. DAVID C. SULLIVAN
3. WESLEY W. POSVAR

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is a dishonest and misleading presentation of the record. Therefore, Respondent submits the following Statement of the Case.

Petitioners have unashameably plagarized the dissenting opinion of The Honorable James Hunter III, in Chipollini v. Spencer Gifts, Inc., 814 F2d. 893, 1987.[1] *They reconstructed the facts of this case to fit within the framework of their plagarized argument, necessitating the submission of this correct Statement of the Case, based upon the record, by Respondent.*

Petitioners' argument changes and moves around words, from Judge Hunter's dissenting opinion, and uses his thoughts and ideas, as if they were their own. Eventually, Petitioners, in their lethargic intellectual effort, blatantly stole[2] *verbatim from Judge Hunter's dissenting opinion, two entire pages of language, without bothering to acknowledge Judge Hunter*

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1. Chipollini v. Spencer Gifts, Inc., 814 F.2d. 893, (3rd. Cir. 1987), (9-1 en banc decision), petition for cert. filed 55 U.S.L.W. 3872 (June 17, 1987). The Honorable James Hunter III, senior judge, participated since he was a member of the original panel. Id at 894, footnote 4.

2. The plagarized portion of the petition submitted by the Petitioners begins on page 13, at the top of the page. The following was copied from the opinion. ". . . no genuine issue of material fact remains for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.* U.S. , 106 S.Ct. 2505, 2511, 91 L.Ed.2d. 202, (1986). . . . a judge must "view the evidence presented through the prism of the substantive evidentiary burden" that the party must bear at trial. Anderson, 106 S. Ct. 2513. . . . "the nonmovant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's

(continued next page)

as its true author, and they have the audacity to present it to this court as their own astute, thought provoking argument for the issuance of a writ of certiorari. Throughout their petition, Petitioners go beyond advancing a legitimate argument to a reconstruction of the record to fit their plagarized argument.

FACTUAL BACKGROUND

Respondent is a black citizen of the United States who was recruited by the University of Pittsburgh, (hereinafter "Pitt"), as an attorney in its legal department, on July 15, 1975. Respondent had an excellent employment record at Pitt, prior to his discharge, on January 3, 1984.

During his eight and one half years of employment at Pitt, Respondent was responsible for providing legal services to the various departments at Pitt on matters of a business-corporate nature and for monitoring the conduct of litigation being handled by outside legal counsel. Respondent's similarly situated coworker, Ronald Talarico, a white male, was

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burden of proof at trial. See *Celotex Corp. v. Catrett*, U.S. , 106 S.Ct. 2548, [91 L.Ed.2d 265] (1986)." In an [ADEA] action, the plaintiff has the burden of persuasion on the issue of discriminatory intent . . . Furthermore, the plaintiff must persuade the jury not only that the defendant's proffered explanation is "a pretext for unlawful discrimination" . . . it is the plaintiff who must prove discrimination; the defendant is not required to prove the absence thereof. See *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978)(per curiam) . . . An employer motivated by ill-will, nepotism or unpublicized financial problems in his termination of an employee is just as likely to use a pretextual explanation for his action as is an employer motivated by statutorily-prohibited discrimination. Employers may even resort to pretext for benign reasons, such as the desire to spare the feelings of a loyal employee whose competence has declined. *Chipollini v. Spencer Gifts, Inc.*, supra at 902-903.

hired in 1977 and was responsible for providing legal services to Pitt departments on matters involving faculty, students and employment discrimination. Each attorney dealt directly with the department for which the legal service was being performed.

From its inception in July 1975, the department was supervised by William Hannan, a white male, until Hannan left Pitt at the end of December 1982. Hannan's specialty was labor law. The department had two secretaries, both white. One secretary was assigned to Hannan and Respondent and the other was assigned to Talarico. Talarico and Respondent were allowed to devote up to twenty percent of their time to their private practices.

Hannan became a private labor arbitrator. He became increasingly more involved with his arbitration practice and began to spend greater amounts of time out of the office at arbitrations. When in the office, he spent large amounts of time writing arbitration opinions. During those periods when Hannan was away from the office, Respondent oversaw most of the operations of the department, although he and Talarico performed their jobs independently. *(Record on appeal p. 70).*

In 1980, Talarico, with Hannan as his mentor, also became a private labor arbitrator. He, too, began spending much of his time doing arbitration work. The secretaries became increasingly more involved in typing Hannan's and Talarico's labor arbitration opinions. In fact, Pitt work was set aside so those opinions could be typed. *(Record on appeal pps. 70, 736).*

By 1982, Hannan's and Talarico's arbitration practices kept both of them out of the office for long periods. When they

were in the office, the secretaries were burdened with typing their arbitration work. Respondent was left with an overwhelming amount of Pitt work and without a secretary who could readily type his work, between typing Hannan's and Talarico's arbitration opinions and their other duties. The secretaries were, by then, totally running the student loan collection program, except for courtroom appearances. Finally, during 1982, Hannan's and Talarico's inattentiveness to Pitt affairs began to concern Pitt's administration. *(Record on appeal pps. 78-84).*

Pitt's Chancellor Wesley W. Posvar asked the Dean of Pitt's School of Law, John Murray, to review the operations of the legal department. After conducting that review, Dean Murray recommended that there be a change in the leadership of the legal department and that the attorneys devote all of their time to Pitt business. Dean Murray, in a letter to Respondent, praised his efforts and accomplishments on behalf of Pitt. Hannan left Pitt in late December 1982.

On January 3, 1983, Hanan was replaced by David C. Sullivan, a white male. Respondent continued his responsibilities. Talarico was now responsible for student loan collections. [In 1981, Pitt had created a new department, the Office of Employee Relations, which had taken a number of responsibilities away from Talarico]. *(Record on appeal 706-710).*

When he arrived at Pitt, although Sullivan took little interest in Respondent's legal work for Pitt, he was often rude or attempted to belittle Respondent. *(Record on appeal 41-53, 59-62, 199, 234-236).*

In March of 1983, Respondent was given a 17% salary increase to forego any private practice. Although Respondent was required to relinquish his private practice, Talarico, who

was also given a large salary increase (30%) was allowed to continue his practice. Both attorneys received another salary increase in July 1983. *(Record on appeal 591, 613-616).*

During the spring of 1983, Respondent learned from reading an article in the student newspaper, the "Pitt News", that Talarico had been appointed Assistant Secretary of Pitt's Board of Trustees. As time went on, Talarico became Sullivan's constant companion. When they were in the department's offices, they were constantly in each other's offices. Although attempts were made, by Respondent, to familiarize Sullivan with his work, Sullivan always refused to discuss Respondent's work. The departments at Pitt usually bypassed Sullivan and dealt directly with respondent. *(Record on appeal 509, 634).*

Sullivan hired another attorney, a white female named Patricia McCullough. she began her employment at Pitt in May or June 1983. She was assigned, by Sullivan, as an assistant to Talarico. Eventually, she took over the student loan collections. She also worked closely with Sullivan on several projects during 1983, although Sullivan got involved in few projects.

In late June or early July 1983, Sullivan hired another attorney, Judy Frank, a white female. She was also assigned to Talarico. Respondent continued to maintain his responsibilities for business-corporate legal matters for Pitt. Although Respondent requested that one of the new attorneys be assigned to assist him, on a number of occasions, Sullivan told Respondent that he would not ever be provided with any assistance.

On July 18, 1983, Respondent became ill at work one afternoon with a severe earache and facial paralysis that his doctor diagnosed as Bell's palsy. The condition made it neces-

sary for Respondent to be off from work for two and one half days. Each morning when Respondent called off from work, Sullivan would get on the telephone and harass him about returning to work. On July 22, 1983, Respondent spoke, by telephone with Sullivan, who was extremely agitated by Respondent's absence. Respondent, with a temperature of 104°, went to work on that Friday, because of Sullivan's attitude towards him. When Respondent arrived at the office, Sullivan handed him a fifty page contract, which had just been received for review, to revise over the weekend. *(Record on appeal 119-125).*

There were some small matters which arose, requiring the attention of another attorney, during Respondent's absence. Most of the work of the office seemed to collapse, during Respondent's short absence, because Respondent was doing most of the substantive legal work in the office and was not permitted to have any assistance or backup on any of the work that he performed.

Although McCullough had only started to work at Pitt in May or June 18, 1983, she had taken a vacation by July. Sullivan also sent her out of town, to a seminar, so that she could visit her sister. Frank started to work in the department in late June and immediately took a vacation. Talarico also took a vacation in June. Sullivan took a month's vacation, during the spring of 1983 and, when he returned, he took a great deal of time off to go to Florida, for personal reasons. When Respondent's white coworkers were at work, they appeared to have little to do.

There were now three secretaries in the office. Respondent shared a secretary, with Sullivan, who also had to administer the office because Sullivan was seldom there. Talarico had a secretary and McCollough and Frank shared a secretary.

A number of Pitt's departments relied solely upon Respondent for legal advice because none of the other attorneys had developed a rapport with the departments of Pitt. Respondent worked on all real estate matters, tax matters, insurance matters, campus police matters, confidential matters for the senior staff, or business and finance matters.

Sullivan was rarely in the office. Talarico often left early to attend arbitrations. McCullough came to work when, and if, she felt like. Frank read the newspaper most afternoons. Respondent was the only employee in that office who was scrutinized by Sullivan and required to be constantly busy. Respondent was usually singled out for unkind remarks at staff meetings. No other employee was subjected to that kind of treatment by Sullivan.

Respondent prepared a detailed memorandum of his work for Sullivan when he took a two week vacation (from August 8, 1983 to August 23, 1983) so that Sullivan would be able to respond to inquiries in Respondent's absence. Upon returning from vacation on August 23, 1983, Respondent found, on his desk, a five page memorandum, from Sullivan, containing unnecessary, unfounded and fabricated criticisms of Respondent's work. Sullivan had taken Respondent's outline of his work and used it to fabricate petty criticisms. Sullivan had little or no first hand knowledge of the matters complained about. *(Record on appeal 84-208, 794-796, 781, 802-806).*

The memorandum criticized Respondent because a coworker hadd received a telephone call for him concerning a project or projects of his, while he was sick or on vacation and on projects of which Sullivan had only a superficial knowledge and of which Sullivan had little or no grasp of the facts.

Sullivan constantly criticized Respondent for things others in the office would not be criticized for and expected Respondent to handle all of his work alone. After reading Sullivan's August 15, 1983 letter, Respondent replied with his letter of August 23, 1983 attempting to respond to the numerous fabrications, innuendo and needless criticism.

From September through December of 1983, the legal department's offices were being extensively remodeled and it became very difficult to work in that area. Respondent found temporary space in another office during the time the remodeling took place. The other attorneys in the department did not spend much time at work.

In September of 1983, Respondent had replaced Sullivan, as the general counsel for the Foundation for Applied Science and Technology, (hereinafter "FAST"). FAST was a corporation, formed by Pitt in 1983, for the purpose of commercializing its research ideas into profit making ventures. Its president was Richard K. Olsen. Sullivan had been asked to resign, as the general counsel of FAST, because he had not begun work on any of the projects that had been assigned to him and FAST had generally become dissatisfied with Sullivan.

There were several research projects for which FAST was seeking investors. Respondent's FAST responsibilities became time consuming and he continued to be totally responsible for all of his other work, as well. Respondent's work with FAST also required him to commute from Pittsburgh to New York City, on a number of occasions, to meet with the attorneys who were putting together the general limited partnership of investors for the research projects.

Respondent was also assigned, by the Chancellor of Pitt, as the legal counsel for a trust fund, administered by Mellon

Bank, from which Pitt's senior administrators would frequently borrow, at a 3% rate of interest and repay interest only during their employment at Pitt, funds for their personal use. That work was performed outside Sullivan's office because neither Sullivan, nor his predecessor Hannan, were trusted by the senior administrators at Pitt. These senior administrators usually hired their own attorney to represent them when entering into the various agreements with Pitt for repayment of these low interest loans.

In November of 1983, Sullivan, a senior staff member, applied for a loan from the trust fund. Sullivan came to Respondent, stated that he was having difficulty, and asked Respondent to assist him in closing on his residence. While at the closing, held in December 1983, Sullivan telephoned his bank and got into an argument with someone at the bank. The bank refused to release the funds, which Sullivan planned to use to remodel his new residence. The closing was delayed, pending resolution of Sullivan's dispute with the bank. Respondent interceded, on Sullivan's request, and the bank released the funds. The closing was finalized the following day. *(Record on appeal 268, 659).*

In December of 1983, Pitt hired a new provost who wanted to borrow funds from Pitt's low interest trust fund as soon as he found a residence. The provost found a house, a closing was held on December 20, 1983 and was attended by Sullivan and Respondent, without a problem.

Respondent, like most employees at Pitt, was off work, during the Christmas holidays, from December 21, 1983 to January 3, 1984. On January 3, 1984, Respondent returned to his newly remodeled office in the department for the first time, in three months, since the renovations had just been com-

pleted. Shortly after 5:00 P.M., while Respondent was in his office working, Sullivan asked Respondent to come to his office. All of the other employees in the office had left for the day. Sullivan told him to hand over his keys and I.D. card. Sullivan spoke arrogantly and joked about firing Respondent. Sullivan told Respondent not to return to the office and that he would be paid until the end of March 1984. *(Record on appeal 218-222, 652-655).*

On January 9, 1984, Respondent filed a formal grievance with regard to his discharge, in accordance with established, published Pitt procedures. The grievance was delivered to the chancellor, in accordance with those procedures, who turned it over to Sullivan to handle. Upon receiving the grievance from Respondent's attorney, Sullivan angrily told him that he would ruin Respondent's career. Respondent, on January 12, 1984, received a confusing letter from Sullivan stating that Respondent would be paid until the end of March 1984 and that Respondent was a "non-classified" employee who was not covered by Pitt's published grievance procedure. Sullivan's "non-classified" category of employee was a subterfuge.

On January 28, 1984, the black female attorney that Sullivan had quietly hired on December 21, 1983, began to work in the department. She had never previously practiced law, but had worked in an administrative capacity for an aquaintance of Sullivan. Respondent's duties were divided among the attorneys in the department who were all given salary increases because of the sudden tremendous increase in the workload of the department.

Following Respondent's discharge, or even perhaps prior thereto, Sullivan began disseminating to employees of Pitt, who Sullivan called "black opinion leaders", documents

which he indicated supported his discharge of Respondent. Most of the documents, in the file which Sullivan disseminated, had not been seen by Respondent because Sullivan had written them to "File", without Respondent's knowledge, and had concealed the documents from Respondent. Respondent heard from other employees about the file, but had no idea what was contained in the file until discovery was conducted in the instant action. On February 10, 1984, Respondent went to Pitt and reviewed his personnel file, but found nothing adverse in the file. *(Record on appeal 686-694, 794-842).*

Sullivan also became quite vocal in attacking Respondent's competence as an attorney, making disparaging remarks about his abilities, as an attorney, to just about anyone who would listen to him. Sullivan made remarks, e.g. "He screwed up my closing"; "He [respondent] screwed up Benjamin's [the new provost] closing". Even Sullivan's supervisor, Wesley Posvar, made a public statement to black employees that Sullivan had reasons to discharge Respondent.

On February 18, 1984, Respondent received another certified letter from Sullivan. This letter told Respondent that, if he did not withdraw his grievance, he would not be paid through March 1984. On February 28, 1984, Talarico notified Respondent's counsel, that Respondent's medical benefits had been terminated on February 28, 1984. On February 28, 1984, Pitt went into Respondent's bank account and removed his February paycheck. Respondent, although he attempted, never had a grievance hearing.

On March 28, 1984, Respondent filed charges of employment discrimination with the Pennsylvania Human Relations Commission, (hereinafter "PHRC"), and Equal Employment Opportunity Commission, (hereinafter

"EEOC"), against Pitt. On November 11, 1984, Respondent received, after requesting, a Notice of Right to Sue letter from the PHRC. Respondent received a Right to Sue letter from EEOC on December 17, 1984. This suit was filed on February 1, 1985.

During discovery, Petitioners took over 1000 pages of Respondent's deposition testimony. Respondent took the depositions of David Sullivan, Ronald Talarico, Judy Frank and Wesley W. Posvar.

During his deposition, Sullivan appeared without any of the files which Pitt contends support their reasons for discharging Respondent. Sullivan could not recollect any of the facts relating to the reasons why he discharged Respondent or what is the meaning of any of the letters, including the one Petitioners have attached as Appendix C to their petition, contained in his personal file on Respondent. Respondent requested production of those files and Petitioners claimed attorney-client privilege.

Sullivan could not cite one instance to support his "evaluation" of Respondent's work performance. He testified that he did not make written evaluations of the attorneys in the office, but he had a secret file on Respondent. Sullivan criticized Respondent harshly for allegedly missing one (1) appointment during the entire year. He didn't know what the appointment was about. He had simply overheard a secretary tell Respondent that someone had called and wondered where he was. But, he stated that he and the other attorneys in the office have also missed appointments.

Sullivan testified that Respondent could only handle the simplest of matters. Yet, Sullivan testified that the legal department could not complete a sizable transaction because Respondent was on vacation, eventhough Respondent had

explained the project, in writing, prior to going on vacation.

Sullivan testified that Respondent was a non-classified employee. Yet, Sullivan could not explain what he meant by "non-classified" nor show any document that used the word "non-classified".

Sullivan testified that people complained about Respondent's work, but could not remember any complaints he received.

Sullivan testified that he tried to rehabilitate Respondent and solicited the assistance of Pitt's Office of Affirmative Action. It is unclear how the Office of Affirmative Action rehabilitates attorneys unless there is some nexus between race, or other protected class of employee, and the performance of the attorney. *(Record on appeal 565-702).*

Sullivan was terminated by Pitt on March 31, 1985. *(Record on appeal 566, 766-767).*

SUMMARY OF ARGUMENT

I. The decision of the United States Court of Appeals for the Third Circuit in the instant case is consistent with the rulings of the United States Supreme Court in *Furnco Construction Corporation v. Waters*, 438 U.S. 5677 (1978); *McDonnell Douglas v. Green*, 411 U.S. 792, (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, (1981); and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

II. Petitioners have grossly distorted the record evidence and the decision of the United States Court of Appeals in *Chipollini v. Spencer Gifts*, 814 F. 2d. 893, 3d Cir. 1987) and the instant case.

III. Respondent has presented evidence which is more than sufficient to raise genuine issues of material fact so as to preclude summary judgement.

IV. The decision of the United States Court of Appeals for the Third Circuit does not conflict with the decisions of other courts of appeals.

REASONS FOR DENYING THE WRIT

I. The Decision of the United States Court of Appeals for the Third Circuit Is Consistent With The Rulings of the United States Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792, (1973) and Its Progeny

A review of the record, in the instant case, shows that there are genuine issues of material fact. In *McDonnell Douglas v. Green*, supra at 802, this court set forth the burdens of proof in individual employment discrimination cases. First, the plaintiff has the burden of proving, by a preponderance of the evidence, a prima facie case of discrimination.

Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection.

Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant were not its true reasons, but were a pretext to discrimination. See also *Texas Department of Community Affairs v. Burdine*, supra.

Petitioners did not dispute whether Respondent established a prima facie case in their arguments before the courts

below. They allude to the issue on page 5 of their petition, but do not clearly address the question. All that the party alleging a discriminatory firing need show is that he was fired from a job for which he was qualified, while others not in the protected class, were treated more favorably. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F2d. 1393, 1395, (3rd. Cir. 1984). See also *Bellissimo v. Westinghouse Electric Corp.*, 764 F2d. 175, (3rd Cir. 1985). Respondent was qualified for the position, which he had performed for eight and one half years, and he was discharged while his white coworkers were retained.

The court found that Petitioners had met their "ensuing burden of production to articulate some legitimate, nondiscriminatory reason" for Jackson's dismissal. *Jackson v. University of Pittsburgh*, et al., 826 F.2d. 230, 233-234, (3rd. Cir. 1987).

Respondent contended that Petitioners had not met their stage two burden of production because they did not dispel the adverse inference of discrimination by producing legitimate, nondiscriminatory reasons for his discharge. Petitioners had simply entered into evidence letters written by Sullivan and meaningless exhibits and left open any inference that may support evidence of deficiencies in Respondent's job performance. Petitioners failed to provide sufficient evidence to frame the factual issues so that Respondent would have a full and fair opportunity to demonstrate pretext. Petitioners reasons were not worthy of credence. See *Texas Department of Community Affairs v. Burden*, 450 U.S. 248, (1981). The court, however, concluded that such an assessment must be made by the factfinder at trial. *Jackson v. University of Pittsburgh*, et al, supra at 234.

At the third stage, the Third Circuit did not shift the bur-

den of persuasion to the defendant, notwithstanding Petitioners argument that it did. see Petition p. 9. The defendant's burden is to show that the plaintiff cannot meet his (or her) burden of proof at trial. *Chipollini v. Spencer Gifts*, supra at 895. The plaintiff continues to have the burden of persuasion after the defendants satisfy their burden of production of evidence of legitimate non-discriminatory reasons. The plaintiff must provide persuasive proof of unlawful intent in order to prevail. Such proof may consist simply of evidence that the reasons proffered by defendants are simply not credible. *Texas Department of Community Affairs v. Burdine*, at 255, n. 10

There is no conflict between the Third Circuit's interpretation of the evidentiary burdens which must be met in a discrimination case in order to survive a motion for summary judgement and the rulings of the United States Supreme Court. There was evidence offered to establish a connection between the discharge and the racial motivation for the discharge. The court found:

> "The record, including Jackson's lengthy deposition, contains more than a scrap of evidentiary materials to support h[is] argument. (citing *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d. 111, 113 (5th. Cir. 1986). Instead, throughout nearly 700 transcript pages, Jackson's deposition in numerous ways calls into question appellees [petitioners'] claims that Jackson was dismissed for performance deficiencies." *Jackson v. University of Pittsburgh*, et al, supra at 234.

Citing the record at 59, 427, 482-484, 527, 234, 352, 283, 286, 360-361, 11-12, 546-550, 63-64, 87, 96, 137, 542, 205-206, 542-544, the court found that the record evidence was:

" . . . more than sufficient to support the reasonable inference that Sullivan's criticisms of Jackson's performance are post hoc concoctions. It also suffices to support an inference that Sullivan orchestrated a campaign to get rid of Jackson because he was black." *Jackson*, supra at 234.

Contrary to Petitioners' argument, the Third Circuit did not hold that no nexus need be shown. See Petition p. 8-17.

II. Petitioners Have Grossly Distorted The Record Evidence And The Decision Of The United States Court of Appeals in *Chipollini v. Spencer Gifts*, 814 F. 2d 893, 3rd Cir. 1987).

Petitioners misrepresent Respondent's contentions and the record evidence when they argue that Respondent "was merely second guessing his employer's evaluation", "tendered self-serving statements" and "none of Jackson's evidence linked his discharge to race, either directly or indirectly". see Petition pp. 15-16. Petitioners assert in their petition that Respondent "suffered from at least . . . [twelve] deficiencies . . ." see Petition, footnote 1.

Respondent did not merely second guess Sullivan's evaluation with self serving statements. The record will show that, in approximately 1000 pages of transcript, Respondent produced evidence to establish that Sullivan and Pitt had fabricated the reasons for his discharge. The court found that "a factfinder reasonably could conclude that appellees' [petitioners'] position is mere pretext. *Jackson v. University of Pittsburgh*, et al. at 235.

Petitioners' argument is that the employer need only announce the reasons for the discharge, at some point in time when they decide what the reasons will be, either before or

after discovery is complete, as they prepared their motion for summary judgment. If the reasons sound legitimate and non-discriminatory, Petitioners argue that the plaintiff cannot challenge those reasons because he is merely second guessing the sound business decision of his former employer.

Petitioners argument is, essentially, that, in an employment discrimination case, all inferences should be resolved in favor of the moving party, if the moving party is the employer and the employee should not be allowed to dispute the employer's proclaimed reason for the discharge, without direct evidence of discrimination. The court, nevertheless, held that defendants' burden of production is not met by "merely showing that the plaintiff's inability to prove by direct evidence that defendant's proffered reason is a pretext for discrimination". *Jackson v. University of Pittsburgh*, et al at 233 citing *Chipollini v. Spencer Gifts, Inc.* 814 F.2d 893, 895 (3rd. Cir. 1987).

The majority in *Chippolini*, supra at 895 held that:

> ". . . the plaintiff is entitled to show that the employer's explanation was pretextual by proffering evidence which is circumstantial or indirect as well as that which shows directly discriminatory animus (smoking gun)."

III. Respondent Has Presented Evidence Which Is More Than Sufficient To Raise Genuine Issues Of Material Fact So As To Preclude Summary Judgment.

Summary judgment is inappropriate if the issues depend upon the credibility of witnesses which can best be determined only after the trier of fact observes the witnesses. *Tunis Brothers Company v. Ford Motor Company*, 763 F.2d 1482, (3rd. Cir. 1985). A review of the record in the instant case will show that there are genuine issues of material fact. Petitioners' Appendix C to their petition raises genuine issues of

material fact. *(Record on appeal 815-819, 411-416)*

There is genuine evidence which calls into question Sullivan's motivation for criticizing Respondent's work performance and Pitt's discharge of him. Sullivan could not present one factual instance to support his "evaluation" of Respondent.

Rule 56 must by construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. *Slaughter v. Allstate Insurance Company*, 803 F2d 857, infra at 860 citing *Celotex Corp. v. Catrett*, 106 U.S. 2548, 1986).

The Third Circuit, like every circuit cited by Petitioners, in ruling on a motion for summary judgment "does not assume the role of factfinder". It is the function of the factfinder alone . . . to evaluate contradictory evidence". *Jackson v. University of Pittsburgh*, et al, supra at 235; App. A at 10a, citing *Firemans' Fund, Inc. v. Videfreeze Co.*, 540 F.2d. 1171, 1178, (3rd Cir. 1976), cert. den. 429 U.S. 1053 (1977).

IV. The Decision Of The United States Court Of Appeals for the Third Circuit Does Not Conflict With The Decisions Of Other Courts Of Appeals.

Petitioners, on page 7 of their petition, misquote the court in *Chipollini*, at 898, by stating that a plaintiff [in the third circuit] can survive summary judgment "without presenting evidence specifically related" to race. The correct quote is "Thus, in addition to establishing his prima facie case by indirect proof, a plaintiff can prevail by means of indirect

proof that the employer's reasons are pretextual without presenting evidence specifically relating to age. Petitioners failed to mention the court's requirement of indirect proof, although they do include "indirect proof" in their footnote 6 on page 7 of their petition.

Throughout the remainder of their petition, Petitioners repeat their misstatement of the court in *Chipollini*.

Petitioners cited a number of cases which they claim are inconsistent with the holding of the Third Circuit, in this case.

Dea v. Look, 810 F.2d 12 (1st. Cir. 1987), was an age discrimination case in which the plaintiff, the fifty eight year old airport maintenance supervisor, was discharged for converting fuel to his personal use, giving improper instructions to those he supervised and withholding information from the airport manager.

The court entered summary judgment for the employer because the employer articulated a plausible, nondiscriminatory reason for treating Dea different from the other employee who had taken fuel for his personal use. Dea, when pressed at his deposition, about the reason for his discharge, admitted taking the fuel and did not assert "age" as a reason for his discharge. Dea alleged "unionization" and "coverup [for some misdoing] by higher officials" as the reason for his discharge. The court held that ". . . evidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question.", *Dea v. Look*, supra at 15.

Slaughter v. Allstate Ins. Co., 803 F2d 857, (5th Cir. 1986), was an age discrimination case in which the plaintiff, an insurance sales agent, was fired for backdating an insurance policy. Slaughter admitted backdating the effective date

of an insurance policy and pointed to nothing other than a conversation, during an investigation, in which he admitted making the change to show that the reason for his discharge was pretextual.

Dale v. Chicago Tribune Co. 797 F2d. 458, (7th Cir. 1986), was an age discrimination case in which the 55 year old plaintiff failed to establish a prima facie case because of a questionable employment history. Id at 465.

Clark v. Huntsville City Bd. of Ed., 717 F2d. 525, (11th Cir. 1983) did not involve a ruling on a motion for summary judgment, but was a trial on the merits. Clark had sued for not being promoted and the court found that there was no "proof of a discriminatory motive". The court noted:

> "We stress that our opinion does not preclude the trial court from basing its finding of a racially discriminatory purpose on circumstantial evidence, including the defendant's failure to rely on the reasons on which it claimed to rely. We state merely that the plaintiff must in fact persuade the court that the defendant acted with a discriminatory purpose." Id at 529, footnote 5.

There is no conflict in the circuits.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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